IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD
(Special Original Jurisdiction)

MONDAY THE TWENTY FOURTH DAY OF SEPTEMBER
TWO THOUSAND AND SEVEN

PRESENT

THE HON'BLE MR JUSTICE BILAL NAZKI

&

THE HON'BLE MR JUSTICE S.ANANDA REDDY

WRIT PETITION NO : 26106 of 2003

Between:
VST Industries Limited,
Azamabad, Hyderabad and another

..... PETITIONERS

AND
The Deputy Commissioner of Central Excise
Hyderabad Division 'E' CLS Building,
III Floor, Station Road, Abids,
Hyderabad and 2 others

.....RESPONDENTS

&

WRIT PETITION NO : 20941 of 2004

Between:
The Commissioner of Central Excise,
Hyderabad-II, Commissionerate,
Hyderabad

..... PETITIONER

AND
The Customs, Excise and Gold (Control)
Appellate Tribunal, South Zonal Branch,
1st Floor, WTC Building, FKCCI Complex,
K.G.Road, Bangalore and another

.....RESPONDENTS

THE HON'BLE MR JUSTICE BILAL NAZKI
&
THE HON'BLE MR JUSTICE S.ANANDA REDDY

WRIT PETITION Nos.26106 of 2003 & 20941 of 2004

COMMON ORDER: (per Hon'ble Sri Justice S.Ananda Reddy)

WP.26106 of 2003 is filed by the petitioners, seeking to call the records from the 1st respondent, relating to Order-in-Denovo 1/2003 dated 28.11.2003 viz., the Deputy Commissioner of Central Excise, Hyderabad Division E, Hyderabad; and to quash the same by issuing a writ, particularly one in the nature of Writ of Certiorari, to the extent that it orders the refund of Rs.7,15,28,042/- to the Consumer Welfare Fund instead of refunding the same to the petitioner; and consequently, direct the respondents to refund the said amount, along with interest at 18% p.a. to the petitioners from the dates of payment by the petitioners till the date of refund by the respondents.

2. It is stated that the 1st petitioner is a company, incorporated under the Hyderabad Companies Act, IV of 1320 Fasli, having its registered office and factory at Azamabad, Hyderabad-500 020. The 2nd petitioner is one of its shareholder. The 1st petitioner carries on business of manufacture and sale of cigarettes in India and abroad and also export of unmanufactured leaf tobacco. For selling arrangements of cigarettes manufactured at its factory at Azamabad, Hyderabad, the petitioner broadly follows the pattern prevalent in the cigarette industry and sells its cigarettes to wholesale buyers in the course of wholesale trade for delivery at the time and place of removal, price being the sole

consideration of sale. The prices charged by the petitioner to its main dealers are uniform and all such sales are on a 'principal to principal' basis. The main dealers in turn sell the cigarettes to retailers from where they are purchased by the ultimate consumers.

3. For the purpose of such clearances, during the relevant period 01.03.1975 to 28.02.1983, the petitioner declared the assessable value under Sec.4 of the Central Excises and Salt Act, 1944 as per the price lists filed with the Central Excise authorities showing the prices charged by the petitioner to its main dealers. All such price lists filed by the petitioner during the period in question for clearances of cigarettes were provisionally approved by the authorities and the cigarettes were cleared during the said period, on provisional assessment basis. It is stated that with reference to the said period, there were certain disputes as to the claims of the assessee, as to the deduction of certain post manufacturing costs, such as advertisement expenses incurred by the dealers, interest on credit sales receivables and trade discounts. There were lot of proceedings up to the Apex Court and finally, the issues were settled by the decisions of the Supreme Court, decided in ***Government of India vs. MRF*** **(1995 (77) ELT 433 (SC))** and also the decision of the Supreme Court in ***Bombay Tyres International vs. Union of India*** **(1983) ELT 1896 (SC))**. Finally, pursuant to the decisions of the Supreme Court, the provisional assessments originally made were finalized and even in the final assessments, certain demands were raised as duty payable by the petitioners. But, however, the 1st petitioner was successful before the appellate Tribunal i.e.Customs, Excise and Gold (Control) Appellate Tribunal (for short 'CEGAT'). Pursuant to the orders of the Tribunal, accepting the claim of the petitioner company that it is entitled for deduction of the post manufacturing expenses by its order dated 03.06.1999, the petitioner filed an application for refund of the excess duty paid.

4. It was the case of the petitioner that various amounts were paid either under the protest or as per the orders of the authorities/Courts. As those payments were not made voluntarily, but in pursuance of the orders of the Department, and as per the directions of the authorities/Courts, the same payments are under protest, and therefore, the amount of excess duty collected by the Department is liable to be refunded.

5. When such an application filed before the 1st respondent, a show cause notice was even issued, proposing to reject the application and finally an order of rejection was passed. The said order was the subject matter of appeal before the Commissioner of Central Excise (Appeals), Hyderabad. The Commissioner of Central Excise (Appeals), though did not agree with the 1st respondent in respect of the grounds, on which the rejection was ordered, but, however, remanded to the 1st respondent for further adjudication which was the subject matter of appeal in Appeal No.E/Misc/302/02 in E/538/02, which was heard and disposed of on 22.11.2002. The said appeal was allowed by the appellate Tribunal, setting aside the orders of the appellate authority. But, however, the remand was confirmed with certain directions. The Tribunal also specifically recorded that since the payments in question were made subsequent to the period in question i.e. 01.03.1975 to 28.02.1983, then on such payments made much after clearance of goods on sale basis, the clause of unjust enrichment cannot be raised, as held in series of decisions. The Tribunal, therefore, remanded the matter with the observations:

> "Therefore, we would order that this matter be remanded to the original authority, to re-determine the refund claims made, based on the facts of payments; if payments are consequent to the orders of the Honourable Courts; CEGAT and as voluntary adhoc payments on account of requests made or are in the nature of deposits or made after the date of clearances, then the

clause of unjust enrichment cannot be invoked."

However, it was made clear that while considering the matter afresh, the 1st respondent was also directed to consider the submissions made with reference to effect of the amended provisions to Rule-9(b)(5) w.e.f.25.06.1999 to be retrospective or not.

6. It is stated that after the remand, the 1st respondent determined the amount of excess duty that was paid by the petitioner, but, however, on the premise that the petitioner did not satisfy the 1st respondent that the above amount of duty paid was not passed on to any other person, the amount was ordered to be refunded to the welfare fund. Against which, the present writ petition is filed, on the premise that the order passed by the 1st respondent is beyond the scope of remand order passed by the Tribunal, therefore, the same is in violation of the directions as well as in contravention of the orders of the CEGAT, therefore, liable to be set aside with a consequential direction for refund of the amount to the petitioner.

7. A counter is filed on behalf of the respondents, disputing and denying the claims of the petitioner. At the outset, a preliminary objection was raised in the counter, stating that against the order of the 1st respondent, an appeal lies under Sec.35 of the Central Excise Act, to the Commissioner (Appeals). There are no circumstances, which would justify the bypassing of the said effective alternative remedy provided under law and to approach this Court. Even on merits also, it was stated that in the impugned order, a clear finding has been recorded that the original authority was finalizing the assessment of the duty, since earlier orders of finalization had been set aside, and as such, in law, the order impugned in the present writ petition, is an order in which the assessment of duty has been finalized. It is stated that the assessment

has been finalized only now and not on 25.06.1997. Though an order was passed earlier and the provisions of Rule-9(b) inserting the proviso to sub-rule-(5) was made after the said date but before passing of the present final assessment order, therefore, the said rule would apply to the present proceedings.

8. That apart, it is stated that as per the decision of the Supreme Court in ***Mafatial's*** case if the final orders passed under sub-rule 5 or appealed against or questioned in a writ petition or suit, then any refund claim arising as a consequence of the decision, Sec.11(B) would apply. Therefore, it is stated that the claim of the petitioner for refund is to be considered in the light of the provisions of the Act and the rules made thereunder, and not dehors the rules. The 1st respondent has decided the claim on merits, in accordance with the rules, and therefore, there is no violation of any of the orders or the provisions, and therefore, the writ is liable to be dismissed, and if there is any omission or inappropriate application of any of the provision, it is for the petitioner to assail the same in an appeal, seeking appropriate remedy.

9. A reply is filed on behalf of the petitioner, reiterating the stand of the petitioner and also referring to the circumstances, as held by the Calcutta High Court in ***Trident Televisions vs. Collector of Customs*** **(1990 (45) ELT 24 (Cal))**. The Calcutta High Court in the said decision enumerated the circumstances under which a writ could be filed bypassing the regular appellate jurisdiction. It is stated that the petitioner has been agitating the issue of deduction of post manufacturing expenses over 30 years and even though the petitioner was successful before the Tribunal where deductions were accepted, still the petitioner is not in a position to get the refund of the amount paid by it, therefore, it is imminent case for filing a writ petition, since the claim of the petitioner which was accepted by the Tribunal was not followed. Therefore, the contention of the respondents that a writ is not

maintainable is clearly devoid of merit.

10. At the time of hearing, the learned senior counsel for the petitioners, while reiterating the averments that have been made in the petition as well as in the reply, contended that categorical findings were recorded by the Tribunal in favour of the petitioner and the remand is a specific remand and not a general remand, therefore, the 1st respondent ought to have confined to enquiry only to the specific directions. But, however, the 1st respondent failed to give effect to the directions and thereby committed error by acting beyond the jurisdiction, therefore, the order is liable to be set aside. It is contended by the learned senior counsel that the disputed period relates to 1975 to 1983, and even after passing of 24 years after from the end of the disputed period, the petitioner is not in a position to get back the excess amount paid either by virtue of the orders of the Court or request of the department or paid by way of pre-deposits or collected by the department by way of encashing the bank guarantees. All these payments are made subsequent to the disputed period during which the sales were effected. As these amounts were paid subsequent to the disputed period, the question of passing on the burden to any third party would not arise.

11. It is claimed that the petitioner effected the sales of cigarettes manufactured by it as per the price list, approved by the department and it is not the case of the department that the petitioner has collected any amount over and above the approved price list. Under those circumstances, the question of passing of the amounts, which the petitioner has paid long after the disputed period to any third party or the purchasers would not arise, and therefore, the petitioner is entitled for refund. The learned senior counsel contended that the Tribunal remanded the matter for a limited purpose of verification whether the amounts in question were paid either as per the orders of the Court or

Tribunal or as a pre-deposit or at the request of the department or not. If once a finding is recorded with reference to the above issue, there is nothing further to decide and the question of the principle of unjust enrichment would not apply to the facts of the present case, as was found by the Tribunal. When once a finding is recorded by the Tribunal that the said principle would not be applicable, the application of the said principle by the 1st respondent, after remand, is clearly beyond the jurisdiction. Therefore, the learned senior counsel sought for setting aside the impugned order.

12. The learned Additional Solicitor General, appearing for the department, on the other hand, sought to sustain the impugned order. It was contended by the learned counsel that though the matter was remanded, it is open to the assessing officer, the 1st respondent to adjudicate upon the matter, in accordance with law, and not contrary to the provisions of the Act as well as the decisions of the Larger Bench of the Apex Court in ***Mafatial's*** case. The learned counsel contended that the findings or the directions, if any, recorded by the appellate Tribunal are not in accordance with law, therefore, the 1st respondent was perfectly justified in deciding the issue, in accordance with law. Since the impugned order was passed in accordance with the provisions of the Act and the Rules as well as the judgment of the Apex Court, the impugned order does not call for any interference. The learned counsel, at length, referred to various observations of the Larger Bench of the Apex Court in ***Mafatial's*** case. Therefore, sought for dismissal of the writ petition.

13. From the above rival contentions, the issue that arise for consideration in this writ petition is whether the 1st respondent's order is in conformity with the directions of the appellate Tribunal, and is it sustainable under law? or whether the petitioner is entitled for refund of

the excess amount of duty, which was admittedly paid after the disputed period.

14. As already mentioned earlier, the dispute relates to the period from 01.03.1975 to 28.02.1983. The petitioner filed the price list of the cigarettes manufactured by it for the purpose of approval by the department for computing of the duties payable from time to time during the said period. As the department while ascertaining the assessable value for the purpose of computing excise duty, declined to exclude post manufacturing expenses, such as selling expenses, advertising expenses, freight charges collected from the wholesale dealers, therefore, the petitioner filed W.P.7143/1974 which was allowed by this Court on 19.12.1975. The same was confirmed in Writ Appeal No.252/1976, dated 18.08.1977. However, subsequently on the premise that there is amendment to Section-4 of the Central Excise Act,1944 w.e.f.01.10.1975 the department took the stand that the judgment of this Court in W.P.7143/1974 does not apply. Therefore, the petitioner filed W.P.1115/1976, claiming deduction of the same items, which were allowed in the earlier writ petition. This writ petition was also allowed on 24.04.1979, holding that even after the amendment also, the above amounts are to be excluded from the assessable value.

15. During the pendency of the above writ petitions, bank guarantees were furnished by the petitioner for the differential duties. Against the above both the writ petitions, the department filed appeals before the Apex Court, as leave was granted by this Court, as Civil Appeal Nos.55/1979 and 2644/1979. The petitioner by virtue of the interim orders of the Apex Court, furnished bonds for the differential duty. The Apex Court permitted the department to make interim demands with reference to the advertising expenses, while allowing the claim of the petitioner in respect of the freight and transport charges, both on cigarettes as well as on smoking tobacco. As per the interim orders, the

Assistant Commissioner, Hyderabad passed orders on 23.08.1985, raising an interim demand for the period from 01.03.1975 to 24.05.1981 for an amount of Rs.21,73,518.97ps. Subsequently, as the Apex Court itself has decided the issue in Civil Appeals 2643 and 2650 of 1979 in the case of ***Union of India vs. MRF Ltd.*** **(1995 (77) ELT 133 (SC)) decided on 08.05.1995,** therefore, the assessments were directed to be finalized in the light of the said judgment. The said judgment was rendered in the petitioner's case on 19.07.1995.

16. Pursuant to the above judgment of the Apex Court, the 1st respondent has finalized the provisional assessments for the period in dispute, as per his adjudication order No.86/97, dated 11.06.1997 disallowing of abatement of trade discount and interest on credit sales and also included the advertisement expenses incurred by the dealers for arriving at the assessable value and decided that the assessee was liable to pay an amount of Rs.12,72,56,903/- plus Rs.3,57,378/-. The 1st respondent after giving credit to the amounts paid by way of interim orders of the Court and also crediting amount paid by the petitioner at the request of the Department, further raised a demand for Rs.2,83,56,727/-. The said matter was subject matter of appeal before the Commissioner (Appeals) and further appeal before the CEGAT.

17. When the request of the petitioner for waiver of pre-deposit was negatived by the Commissioner (Appeals), the petitioner filed a writ petition and paid an amount of Rs.1,00,00,000/- as per the interim order and also furnished bank guarantee for Rs.1.84 crores. After the dismissal of the appeal, the Department encashed the said bank guarantee and collected the entire demanded duty. The CEGAT by order dated 03.06.1999, allowed the appeal on all the three issues viz., trade discount, interest on credit sales and advertisement expenses incurred by the main dealers.

18. After the said order of the CEGAT dated 03.06.1999, the assessee filed a statement before the Deputy Commissioner, claiming for refund of Rs.7,40,28,020/- claiming that the said amount has been paid on account of the above three elements. The 1st respondent, however, rejected the said claim by his order dated 27.06.2000 on the following grounds:

(1) The refund claim is premature one, as the assessee can prefer the refund claim after the refinalisation of assessments by the jurisdictional authority;

(2) The amounts which were paid without following the procedure laid down under Rule 233-B of Central Excise Rules, 1944 can not be refunded;

(3) The assessee has not submitted any documentary evidence to show that the amount of duty claimed as refund has not been passed on to the customers and the incidence of duty passes on the innumerable consumers in the society and hence the assessee is not eligible for refund;

19. This was the subject matter of an appeal before the Commissioner (Appeals), who, in his order in Appeal No.224/2001, dated 20.11.2001, modified the order to some extent and the findings are:

(1) Though the refund claim was made before the finalization, the Deputy Commissioner should have refinalised the assessments and examined the eligibility of refund;

(2) The refund claim is not time barred as the assessments are not finalized and also the payments have not been made voluntarily but made as per the directions of the department or the Courts. As such, the payments are deemed to be made under protest;

(3) The assessee's contention that the unjust enrichment in terms of Section 11-B is not applicable to the refunds arising out of the finalization of provisional assessments is not correct. The judgments of Supreme Court and CEGAT quoted by the assessee in this regard relate to the period prior to 25.06.1999, the date on which proviso has been added to Sub Rule (5) of Rule 9(B) of Central Excise Rules,

1944. As per Rule 9B(5) if an assessee is entitled to a refund, such refund shall be made as per Section 11 (B) (2). As the assessments are still provisional, this rule is applicable to the instant case;

(4) The assessee's contention that the unjust enrichment is not applicable in this case, the payments were made much after the clearance of cigarettes is also not correct. It is to be ascertained whether the said amounts were already recovered by the assessee in any manner at the time of clearance of cigarettes and then retained by them and thereafter paid to the department in piece meal from time to time. If so, the clause of unjust enrichment is applicable to the present case;

20. The said order of the Commissioner (Appeals) was subject matter of an appeal, and CEGAT by order dated 22.11.2002 set aside the order, holding:

(1) As the amounts were paid much after the clearance of the goods on the sale basis (i.e.subsequent to the period 01.03.1975 to 28.02.1983), the clause of unjust enrichment cannot be raised;

(2) The orders of the lower authorities are not as per Section 11 (B)(2). First, it is to be determined whether any amount is required to be refunded. If so, to whom it has to be paid, i.e. to the welfare fund or to the assessee. Merely rejecting the application for the refund on the basis of unjust enrichment is not correct and the same is not provided under Section 11 (B) (2);

(3) The matter has been remanded to the original adjudicating authority to redetermine the refund claim basing on the facts of payments. If the payments are consequent to the orders of Court/CEGAT/Department, then the clause of unjust enrichment cannot be invoked;

(4) Payment of interest cannot be covered under the clause of unjust enrichment, if the original duties are required to be refunded to the applicant or to the welfare fund;

(5) Deputy Commissioner will take into consideration the submissions made by the assessee with regard to the payment of duties under protest. Further, the effect of amendment to Rule 9(B)(5) to be retrospective or not is left open. The assessee can make submissions before Deputy

Commissioner;

21. Holding so, the Tribunal observed that the original order of the Deputy Commissioner cannot be sustained as it has not been in compliance with the provisions of Sec.11-B(2), the order of the Commissioner(Appeals) also cannot be upheld. Holding so, the matter was remanded to the Deputy Commissioner to pass an order in the light of the directions, after hearing the appellant, as per law. Thereafter, the 1st respondent took up the matter. The 1st respondent, instead of confining the enquiry for ascertaining the differential duty that was collected from the assessee in respect of the three items, in respect of which relief was granted by the CEGAT and as to the nature of the payments, as directed by the CEGAT, however, treated the matter as if he was finalizing the price list as well as finalizing the assessment. The order of the CEGAT was very much clear, but after repeatedly extracting and referring to the orders of the Commissioner (Appeals), which was set aside passed orders, as if it was the final assessment.

22. The 1st respondent was conscious of the order passed by the CEGAT on 03.06.1999, granting the relief with reference to three items of the dispute in respect of which the assessee was canvassing for exclusion of the amounts involved from the assessable value. The said order of the CEGAT has become final. But, however, while considering the application of the assessee/petitioner for refund of duty paid, the department took a different stand which had resulted in carrying the matter again to the CEGAT. Even after the second round also, the 1st respondent referred to various payments made by the petitioner and gave categorical finding that these payments were made, as per the orders of the Court as well as the request of the department and also as and by way of pre-deposit, as a result of which, these amounts are to be

refunded, as the 1st respondent admittedly found that the excess duty was collected from the petitioner to the tune of Rs.7,15,28,042/-. The relevant finding recorded by the 1st respondent is as under:

> "From the perusal of the case records, it is observed that the payments were made by the appellants as per the directions of the Department from time to time and as per the directions of the Court. The payments were made by the appellants not out of their own sweet will but on the directions and insistence from the department and also on the directions from the Court. Hence, such payments made by them will be deemed to be made under protest."

Though this was the finding of the Commissioner (Appeals), which was set aside, but, however, the 1st respondent recorded his approval and agreement with the above finding and finally recorded that "*I find that the payments made by the assessee are deemed to have paid under protest*."

23. Thereafter, though the assessee relied upon certain decisions, which are referred to in the order of the 1st respondent at *para-37*, however, without considering the application of those judgments, but on the premise that in the case of *M/s.Contemporary Package Technologies Limited vs. CCE, Vadodara*, CEGAT held that if the differential duty is to be refunded consequent to the decision of the Court/Tribunal, the doctrine of unjust enrichment is to be applied. Therefore, it was held that in the light of the said judgment, the principle of unjust enrichment applies to the present case. Therefore, the petitioner is not entitled for refund of the duty, but, however, ordered refund of only the interest, collected to the tune of Rs.25 lakhs.

24. The contention of the petitioner is that the 1st respondent instead of giving effect to the order of the CEGAT by examining as to the nature of the payment and passing a consequential order, has gone beyond the scope of the remand order and dealt with the matter as if the

1st respondent was finalizing the provisional assessment. It was contended that the provisional assessments made for the relevant period were finalized by passing final assessments where the claim of the assessee was negatived by the departmental authorities, but the petitioner was successful before the Appellate Tribunal. After that only an application for refund of the excess duty paid was made which was again rejected by the Deputy Commissioner and which was partially modified by the Commissioner (Appeals) while remanding the matter. But the Tribunal set aside the orders of both the original authority as well as the appellate authority and gave specific directions to decide as to the nature of the payments that are made by the petitioner and pass consequential order.

25. It is contended that the 1st respondent was required to determine whether the payments made by the petitioner were consequent to the orders of the Courts, CEGAT or voluntary *ad hoc* payments on account of the request made by the department or in the nature of deposits or payments made after the date of clearances in which case the clause of *unjust enrichment* cannot be invoked. The 1st respondent, instead of confining the enquiry as to the nature of payments and to pass consequential order of refund, has gone on tangent without deciding the issues that are directed to be decided by him. The 1st respondent decided that the excess duty paid is required to be refunded as the provisions of Sec.11-B do not apply to the refund of duty consequent to the finalisation of provisional assessment, therefore, an amount of Rs.7,15,28,042/- is required to be refunded. But, thereafter he referred to the order of the Commissioner (Appeals) though the said order was set aside by the Appellate Tribunal and adopted the findings recorded by the Commissioner where the Commissioner found "*from the perusal of the records it is observed that the payments were made by the*

appellants as per the directions of the department from time to time and as per the directions of the Court. The payments were made by the appellants not out of their own sweet will, but on the directions and insistence from the department and also on the directions from the Court." Adopting the said finding, the 1st respondent also adopted the final finding that such payments made by the assessee are deemed to have been made under protest. Thereafter, the 1st respondent referred to and relied upon another decision of the Tribunal, and accordingly, held that the petitioner is not entitled for refund of the amount, observing that the principle of *unjust enrichment* would be applicable.

26. The 1st respondent also tabulated the payments that are made by the assessee and in all the cases of payments, it was shown that those payments were made in pursuance of the Court orders/departmental orders long after the clearance period. With reference to the amount of Rs.6,40,00,000/- shown at serial No.3 paid during the period from 31.08.1986 to 11.03.1987 was voluntary *ad hoc* payments, which are also paid after the clearance of the goods. Similarly, an amount of Rs.2 crores was shown to have paid by way of deposit on account of request made by the department without determination of liability. Similarly, an amount of Rs.1 crore shown at serial No.5 was paid by way of deposit pursuant to the orders of the High Court in a writ petition on 06.02.1998 i.e. long after the clearance of the goods to avail the right of appeal. Further, bank guarantee for an amount of Rs.1,83,56,727/- was furnished as per the orders in the writ petition referred to earlier and this amount is shown at serial No.6. The said bank guarantee was given during the pendency of the appeal before the Commissioner (Appeals). As soon as the Commissioner (Appeals) dismissed the appeals, this amount was realized by encashing the bank guarantee. Therefore, it is clear from the tabular

statement given by the 1st respondent himself that an amount of Rs.12,76,14,220/- was collected by the department under the orders of the Court or voluntary deposits or deposited at the request of the department or collected by way of encashment of bank guarantee. Since the Tribunal directed the 1st respondent to ascertain and determine the refund claim basing on the directions, it was made very clear that if the deposits were made after the date of clearance, then the clause of *unjust enrichment* cannot be invoked. Therefore, that direction itself is sufficient to hold that the 1st respondent has gone beyond the order of the remand for denying the refund.

27. Before proceeding further, it would be proper to refer to the decisions that are relied upon on either side.

Coming to the decisions relied upon by the petitioners, in ***Mahavir Aluminium Ltd. Vs.CCE, Jaipur***[1] while considering the issue of pre-deposits, the Bombay High Court held that pre-deposits made by the dealers/manufacturers are liable to be refunded, if such deposits made are in excess of the duty payable by the said dealers/manufacturers. The Apex Court held that the principle of *unjust enrichment* would not be applicable. In that case, the appellant was engaged in the manufacture of agricultural irrigation equipment, which is used mainly for sprinkling water in the fields, lawns and gardens. The appellant, prior to commencing the production, by a letter sent along with classification list, claimed exemption for payment of duty in terms of notification dated 10.02.1986 as amended by another notification dated 14.03.1986. However, the Assistant Collector held that the appellant is not eligible for exemption under the said notification.

28. The matter was carried in appeal and the Collector upheld the order made by the Assistant Collector. When a further appeal was filed before the CEGAT, the appellant pointed out that he is entitled to

the benefit of exemption in view of the notifications issued in this behalf. However, the CEGAT took the view that the appellant was not eligible to claim exemption under the said notification. Therefore, an appeal was filed before the Apex Court. Before the Apex Court, it was brought to the notice of the Apex Court that the Central Board of Excise and Customs issued Circular dated 27.06.1994 granting exemption in respect of agricultural mechanical appliances and it was specifically stated that the agricultural implements include agricultural mechanical appliances/machinery and would be covered by the exemption in Notification dated 14.03.1986, under which the claim was made by the appellant. The Apex Court, therefore, held that in view of the Circular issued by the Board, the Department ought to have allowed the claim of the appellant and they are bound by such circulars issued under Section 37-B of the Central Excise Act.

29. At that stage, it was brought to the notice of the Apex Court that when the appeal was pending before the CEGAT, a conditional stay was granted directing the appellant to pre-deposit an amount of Rs.4,44,000/- and on compliance thereof, the balance amount of duty shall stand waived till the disposal of their appeal and that amount should not be released to the appellant until he establishes that he has not wrongly enriched himself by collecting duty from his customers. It was observed that it is not clear that the amount paid is a condition for waiving of payment for grant of stay by the appellate authority and not duty, which is to be refunded. In that view of the matter, the Apex Court held that there is no reason to accede to the contention advanced by the respondent, therefore, the appeal was allowed and refund was ordered.

30. Similarly, in ***Suvidhe Limited vs. UOI***[2] a Division Bench of the Bombay High Court considered the similar issue. In that case a show cause notice was issued by the Superintendent (Tech.) Central Excise to the petitioner to show cause why the refund claim for excise

duty and redemption fine paid in a sum of Rs.14,07,410/- should not be denied under Section 11-B of the Central Excise Act and the Rules made thereunder, which was assailed before the Bombay High Court. It was contended that the said deposit made by the petitioner was not towards excise duty but by way of deposit under Section 35-F for availing the remedy of appeal. Appeal of the petitioner has been allowed by the Appellate Tribunal by an order dated 30,11.1993 with consequential relief. Petitioner's request for refund of the amount has not received a favourable response. On the contrary, the impugned show cause notice was issued proposing to forfeit the amount. The Division Bench held that in respect of deposit made under Section 35-F, provisions of Section 11-B can never be applicable. A deposit under Section 35-F is not a payment of Duty but only a pre-deposit for availing the right of appeal. Such amount is bound to be refunded when the appeal was allowed with consequential relief. In respect of such deposit, the doctrine *unjust enrichment* will be inapplicable, therefore, directed for the refund of the aforesaid amount along with interest at 15% p.a. from the date of the order of the Appellate Tribunal till the payment.

31. The learned counsel for the petitioner contended that the above judgment of the Bombay High Court was affirmed by the Apex Court when the department carried the matter in appeal by filing a Special Leave Petition. The Apex Court declined to grant special leave. It is further contended that subsequently the department itself has accepted the said view and issued even circulars for refund of such pre-deposits made by the dealers. It is stated that a copy of the letter of the Additional Commissioner, Office of the Commissioner of Central Excise & Customs, Hyderabad-III, Commissionerate, dated 23.04.2001 was filed showing that even the said letter was communicated by the department that in case of pre-deposits not even application for refund was required, but a simple letter requesting for refund of such deposits is

sufficient for refund of the same. The Department also by referring to the observations of the Apex Court in the cases of ***Suvidhe Ltd*** and ***Mahavir Aluminium*** issued circular for refund of the pre-deposits to the depositors, wherever they succeed in the appeals together with interest.

32. In ***CCE, Hyderabad vs. ITC Ltd.***[3] the Apex Court while considering the similar issue, observed that the issue in this appeal and in several other appeals is whether the pre-deposit made as a pre-condition for hearing of the appeal under the Central Excise Act,1985 was, on the assessee being ultimately successful, refundable to the assessee with interest. The learned Solicitor General has taken instructions and has stated before this Court that the Central Board of Excise & Customs proposes to issue a circular in connection with the payment of interest on all such pre-deposits, and a draft copy of the proposed circular has been handed over to this Court. Having regard to the contents of the draft circular, the Court directed compliance with the final order impugned before the Court and payment of interest in terms of the draft circular. Finally the Central Board of Excise & Customs has even issued a Circular bearing No.802/35/2004-CX, dated 08.12.2004, directing the departmental officials for refund of the pre-deposits made as per the directions of the Tribunal and if there is delay beyond the period of three months, in such cases, the inaction will be viewed adversely and appropriate disciplinary action will be initiated against the concerned departmental officers. It was also made clear that the default in refund of the amount will entail an interest liability against the department.

33. The learned counsel for the petitioners also relied upon the following decisions (1) ***CC&CE Hyderabad v. Novopan***[4], (2) ***CCE, Belgaum vs. Gokak Mills***[5], (3) ***MNA Mohd.Sultan & Sons vs. CCE, Trichy***[6], (4) ***Hindustan Lever Limited vs. CCE***[7], (5) ***CCE,***

Visakhapatnam vs. Glaxo Smithkline Consumer Healthcare Ltd.[8] and (6) ***Birla Ericson Optical Ltd. Vs.CCE, Bhopal***[9] in support of his contentions that if a refund is due as a result of finalisation of the provisional assessment, the same has to be refunded. It may not be necessary to deal elaborately with these decisions as they are rendered by the Tribunal. But, however, the learned counsel contended that in all these cases refund was ordered wherever the excess payment of duty was found, observing that the principle *unjust enrichment* would not be applicable to such payments found in excess of the liability and those orders of the Tribunals have become final and the learned counsel relied upon these decisions only to show that the department has conceded the position, therefore, even on that ground also the petitioner is entitled for refund of the excess amount found to have been paid by the petitioner.

34. Similarly, the learned counsel for the petitioner also relied upon various decisions of the Tribunal, apart from the decision of the Punjab & Haryana High Court in ***CCE, Modi Oil & General Mills***[10], where payments made subsequent to the clearance of the goods are ordered to be refunded in viz., (1) ***CCE vs. Modi Oil & General Mills***[11], (2) ***Punjab Beverages Vs.CCE, Chandigarh***[12], (3) ***Industrial Cables (I) Ltd. Vs.CCE, Chandigarh***[13], (4) ***Easter Industries vs. CCE, Meerut***[14], (5) ***Silwester Textiles P.Ltd. Vs. CCE***[15] and (6) ***CCE, Pondicherry v. Southern Agrifurane Indus Ltd.***[16]***.*** In all these cases, different Benches of the Tribunals have held that the principle of *unjust enrichment* would not be applicable where payments are post clearance payments. Even in the case of ***CCE, Modi Oil & General Mills*** **(10 supra)** the Department approached the High Court seeking reference under Section 35-G of the Central

Excise Act "whether the CEGAT has erred in allowing refund of Central Excise Duty even when the respondent has failed to discharge the burden to prove that the incidence of duty had not been passed on to the buyer as required under Sub-Section (1) of Section 11-B and Section 12-B of the Central Excise Act, 1944." In that case, the assessee had been operating a hot steel re-rolling mill. It manufactures *inter alia* hot re-rolled products of non-alloy steel, which are chargeable to duty as per Section 3A of the Act read with notifications. The said assessees unit was assessed on the basis of Annual Production Capacity (ACP) of the unit. The assessee opted for paying duty on lump sum basis basing on ACP as on 05.09.1997. The Range Officer under Rule-5 of the Hot Re-rolling Steel Mills Annual Capacity Determination Rules, 1997 recommended the ACP to be 16583.687 MT on the basis of the assessee's annual production of 1996-97. The Deputy Commissioner vide his order dated 23.03.1998 also recommended the same. The duty liability worked out is Rs.4,14,592/-. The Commissioner vide his order dated 03.03.1999 determined the ACP of the assessee as 13927.268 MT with effect from 01.09.1997 and 11922.960 MT with effect from 23.12.1997. As the assessee had deposited the excise duty for the period September, 1997 to March, 1999, it claimed the excess amount either by way of refund or adjustment.

35. The Deputy Commissioner, Patiala invoked the principle of undue enrichment by concluding that the assessee must have recovered the duty from their buyers by adding in the cost of their production. Consequently, a show cause notice was issued to the assessee for crediting the refund to the Consumer Welfare Fund. The Deputy Commissioner in his order dated 10.02.2001, held that the assessee has actually collected the duty from their buyers and has, thus, passed on the incidence of duty to them. Therefore, he is not entitled for the refund.

36. The assessee filed an appeal before the Commissioner (Appeals) against the order of the Deputy Commissioner, who accepted the appeal by holding that the assessee had deposited Rs.10,87,824/- on 25.03.1998 in respect of the period 1997-98 after the goods had been cleared and, therefore, it could not be established that the amount of duty had passed on to the buyer. Accordingly, the Commissioner (Appeals) ordered refund of the said amount. Against which, an appeal was filed before the CEGAT by the department, which dismissed the appeal. Against which, a reference was sought for by the Revenue. The High Court of Punjab & Haryana, having found that the amount of Rs.10,87,824/- was paid after the clearance of the goods, agreed with the finding of the Commissioner that the amount was deposited on demand of the Deputy Commissioner from out of their own pocket, therefore, the principle of *unjust enrichment* would not be applicable, and therefore, the application, seeking reference, was dismissed.

37. To the similar effect, are the decisions of the other Benches of the Tribunals, referred to above, which are allowed to become final without carrying the matter in further appeal or reference.

38. The learned counsel for the petitioner also relied upon some of decisions contending that in respect of the amount, which is refundable, the assessee is entitled for interest for the belated period. In ***Nestle India vs. ACCE***[17] while considering the issue of refund of pre-deposit, the High Court of Karnataka directed that the respondent authorities to refund the pre-deposit along with 15% interest, apart from imposing costs for non-refund of the pre-deposit.

39. In ***South Eastern Coal Fields Ltd. vs. State of MP & Others***[18] the Apex Court while considering the payment of interest on the delayed payments of royalty, it was held that the mining lessees are bound to pay the interest as per the terms of the mining leases and in

fact, observed that the Central Government can make provision for payment of interest on the amount of royalty for the period of delay in payment.

40. The learned counsel also relied upon the Circular No.802/35/2004-CX, dated 08.12.2004 where it was ordered that interest is payable for the delayed refund of the pre-deposits. The learned counsel also relied upon the decision of the Bombay High Court in ***Suvidhe Limited vs. UOI*** **(2 supra)** where it was ordered payment of interest at 15% p.a. on the delayed period. Therefore, sought for appropriate orders.

41. Coming to the decisions relied upon by the respondents, in ***Mafatlal Industries Ltd. v. Union of India***[19] a Larger Bench of 9 Judges had reviewed the entire case law vis-à-vis the provisions of the Central Excise and Salt Act, 1944 as well as Central Excise and Customs Laws (Amendment) Act, 1991, especially with reference to the refunds of the excise duty or customs duty paid. The learned Additional Solicitor General specifically relied upon Paragraph Nos.77, 78, 91, 95, 97 and 100 of the judgment.

42. In para-77 of the judgment the provisions of Rule 11 and Sections 11 and 11-B of Central Excises and Salt Act are considered. It was held that in all cases of refunds one has to make an application under the provisions of the Act, and the refunds have to be considered only in terms of the relevant Act and the Civil Courts' jurisdiction is completely barred. The Apex Court has even gone into the scope of the jurisdiction under Article-226, exercisable by the High Court and the jurisdiction of the Supreme Court under Article-32. The Apex Court while holding that the jurisdiction under the above respective Articles of Constitution of India are not barred, but, however, equally obvious that while exercising the power under Article-226/Article 32, the Court would certainly took note of the legislative intent manifested in the provisions of

the act and would exercise their jurisdiction consistent with the provisions of the enactment.

43. In para-78 of the judgment an exception was noted where duties collected under the provision which was found to be unconstitutional for violation of any of the constitutional limitation and such a situation was not provided under any of the provisions of the Act or the Rules. In such a case a claim could be made under Section 72 of the Contract Act. But, it was further held that even under the provisions of Sec.72 of the Contract Act, a rule of equity embedded in it. Therefore, it necessarily follows that equitable considerations are relevant in applying the said rules. It was held that even though such a right flows as constitutional right flowing from Article-265 or as a statutory right/equitable right affirmed by Section 72 of the Contract Act, the result is the same—there is no automatic or unconditional right to refund.

44. In para-91 of the judgment, the Apex Court considered the issue with reference to Sub-Section (3) of Section 11-B, whether the said provision is exhaustive of all kinds of refund claims, including those which are refundable as a consequence of appellate/revisional order and/or as a consequence of orders made by the High Court/Supreme Court. The said Sub-Section-3 of Section 11-B was omitted from the provisions of the Act in 1991. Therefore, it was observed that even in such cases a refund claim shall be in accordance with Sub-Sections (1) and (2) of Section 11-B. The Court rules that all the applications are to be considered and disposed of under and in accordance with the provisions relating to the refund as they obtained from time to time.

45. In para-95 of the judgment, the Apex Court referred to the amounts paid under the orders of the Court pending in Appeal/Reference/Writ Petition, it will certainly be a payment under protest, in such a case, it is obvious, it would not be necessary to lodge the protest as provided by Rule 233-B.

46. In para-97 of the judgment, the Apex Court considered the scope of Sec.12-B and observed that the said provision does not create a new presumption unknown till then. It merely gives a statutory shape to an existing situation, as explained earlier. At the most, it can be said that there were two views on the subject and Section 12-B affirms one of them. Even without Section 12-B, the true position is the same, as held in the said judgment. The obligation to prove that duty has not been passed on to another person is always there as a precondition to claim refund. It cannot also be said that by giving retrospective effect to Section 11-B, any vested rights or substantive rights are being taken away. The deprivation, if at all, is not real. The manufacturer has already collected the duty from his purchaser and has thus reimbursed itself. By applying for refund yet, he is trying to reap a windfall, deprivation of that cannot be said to be real or substantial prejudice or loss. A manufacturer had no vested legal right to refund even when he had passed on the burden of duty to others. No law conferred such a right in him—not Article-265, nor Section 11-B. It was only on account of an incorrect view of law taken in ***STO v. Kanhaiya Lal Mukundlal Saraf*** **(AIR 1959 SC 135)** and that cannot be treated as a vested legal right. Correction of judicial error does not amount to deprivation of vested/substantive rights, even though a person may be deprived of an unwarranted advantage he had under the overruled decision. In cases, where the burden is not passed on, there is no prejudice; he can always get the refund.

47. In para-100 of the judgement, the Larger Bench considered the contention that in a competitive atmosphere or for other commercial reasons, it may happen that the manufacturer is obligated to sell his goods at less than its proper price. In the process, the manufacturer may have to forego not only his profit but also part of excise duty and that in such a case levy and collection of full excise duty would cease to be a

duty of excise; it will become a tax on income or on business. The said contention was negatived. Observing that till recently it was always a sellers' market, in addition, if any, duty has not been passed on to any other person, it is always open to the manufacturer to claim refund by proving the fact that he has not passed on the burden of duty.

48. In ***CCE v.Allied Photographics India Ltd.***[20] wherein the manufacturer on the department's direction paid excise duty under protest for the period 1.3.1974 to 31.10.1984 on the price charged by its sole distributor. Subsequently, in view of the decision in ***Bombay Tyre International Ltd.*** case **(1984) 1 SCC 467**, the manufacturer made a claim for refund of the excess duty paid by it. However, in view of the manufacturer's concession that it had passed on the burden to its sole distributor, Supreme Court held that the manufacturer is not entitled to refund, but granted liberty to the distributor to adopt appropriate remedy as might be available under law. The distributor, therefore, moved its refund claim under Section 11-B on 11.2.1997 in respect of the amount, refund whereof had earlier been claimed by the manufacturer. It was held that such refund claim of the distributor would attract the provisions of Section 11-B and could not be equated with payment under Rule 9-B. The distributor's claim that it could step in the shoes of the manufacturer and seek benefit of exemption from limitation under second proviso to Section 11-B(1) was rejected. In fact, the refund application made by the distributor was allowed by the Deputy Commissioner and confirmed by the Appellate Commissioner as well as by the CEGAT.

49. But, however, in the appeal filed by the department before the Apex Court, the appellant-department contended that exemption from the limitation period of six months under Section 11-B, as amended, could be available only to the manufacturer paying duty under protest and not to the purchaser of the duty-paid goods on finalisation of

assessment of duty payable by the manufacturer. It was also claimed that the application filed on 11.2.1997 independently by the distributor was governed by Section 11-B(3) as amended. The department also disputed the respondent's contention that it had not passed on the burden to its dealers.

50. It was also held that under the Act, duty was payable by the manufacturer on his own account, hence, under Section 11-B(1) such a person had to claim refund by making an application within six months from the relevant date except in cases where duty was paid under protest in terms of the proviso. However, even in such cases, the person claiming refund had to pay the duty under protest in terms of the prescribed rules. Thus, Section 11-B(1) refers to claim for refund as against making of refund by the proper officer under Rule 9-B.

51. The Apex Court also held that the provisions of Section 11-B and Rule 9-B operate in different spheres, and the application made by the distributor on 11.2.1997 fell in the category of refund claim being made after finalisation of the assessment of the manufacturer, therefore, Section 11-B had to be complied with in terms of para-104 of the judgment in ***Mafatlal Industries Ltd.*** case, **(1997) 5 SCC 536**. Since there was failure to comply with Section 11-B, the respondent was not entitled to refund.

52. In ***Sahakari Khand Udyog Mandal Ltd. v. CCE***[21] where the appellant was the assessee engaged in manufacturing of sugar falling under Item-1(1) of the First Schedule to the Central Excise Act. As per the notification issued under the Central Excise Rules, exemption was provided from payment of excise duty leviable thereon in excess of average production of sugar of the corresponding period of preceding three years. The appellant/assessee claimed the benefit under the notification available though the sales of levy sugar and free sugar are to be effected in proportion of 65:35 respectively, but, however, the said

ratio was not followed. Therefore, the authorities have calculated the benefit of exemption on the basis of actual sale of sugar and consequently, reduced the amount of rebate. Even with reference to the exemption, the appellant/assessee paid the duty under protest and passed on the same to its customers. Further, the refund application was filed on 14.08.1978 for the production years 1976-77. The application was, therefore, rejection on the ground that it was barred by limitation. The claim was also rejected on the ground of *unjust enrichment* since the appellant failed to show that the duty levied and paid was not passed on to others.

53. In ***C.S.T. v. Bishamber Singh Layaq Ram***[22] the Apex Court, while considering the case under U.P.Sales Tax Act, 1948, held that the question neither raised before revising authority nor referred to High Court, therefore, the High Court on a reference under Section 11(4) cannot go into the question, which was not referred to it.

54. In ***S.Shanmugavel Nadar v. State of T.N.***[23] the Apex Court held that the effect of summary dismissal of SLP on technical grounds against High Court judgment under appeal, doctrine of merger not applicable. It was further observed that the contents of the order of this Court clearly reveal that neither the merits of the order of the High Court nor the reasons recorded therein nor the law laid down thereby were gone into nor could they have been gone into. In that view of the matter, the decision laid down by the Division Bench of the High Court or the reasons given by the said Bench could not be treated as that of the Apex Court, which dismissed the Leave Petition on technical grounds.

55. From the above it is clear that the judgments relied upon by the petitioner shows that where payments have been made either as pre-deposit or to avail the remedy of appeal or in compliance of an order

of the appellate authority cannot be considered as payment of the excise duty pursuant to the assessments, and therefore, the principle of *unjust enrichment* would not be applicable to such payments, as is held by the Apex Court in ***Mahavir Aluminium Ltd. Vs.CCE, Jaipur*** **(1 supra)** and ***Suvidhe Limited vs. UOI*** **(2 supra)** of Bombay High Court, which was confirmed by the Apex Court by refusing to grant special leave to appeal against the said judgment. In fact, in ***CCE, Hyderabad vs. ITC Ltd.*** **(3 supra)** it was conceded by the Department that where deposits were made as pre-condition for hearing of the appeal under the Central Excise Act, and if the assessee ultimately succeeds in the appeal, the said amount of pre-deposit is refundable to the assessee with interest. In fact, that was the representation made on behalf of the department by the learned Solicitor General before the Apex Court and in fact, even draft copies of the circulars prepared for the department as and by way of the instructions to the departmental officers were placed, and in fact, subsequently also detailed circulars have been issued by the Central Board of Excise and Customs where the pre-deposits were even directed to be refunded with interest, and if such deposits are delayed beyond the period of three months, the inaction of the officers will be viewed adversely and appropriate disciplinary action will be initiated against the concerned officers.

56. On the other hand, as per the judgments relied upon by the learned Additional Solicitor General shows that all refunds are to be considered either in terms of Section 11-B of the Act or Rule 9 (b) of the Rules made thereunder, and in all cases, the refund claim has to be examined in the light of principle *unjust enrichment* and unless and until an assessee proves that he has not passed on the burden to any other person, he is not entitled for an order of refund. But, however, in all those judgments relied upon by the department, though it was observed in general terms that all the refunds are to be considered in terms of

Section 11-B/Rule 9(b), but, however, in none of the cases, the issue of pre-deposit in order to avail the remedy of appeal or deposits made at the request of the department by way of advance deposits or where payments are made subsequent to the clearance of the goods was not considered. On the other hand, the decisions relied upon by the petitioners clearly shows that in the above circumstances, the assessee is entitled for refund together with interest for the delayed period.

57. In the light of the above legal position, if the facts of the present case are considered, the assessments have been finalised as early as in the year 1999 and in fact, the claim of the petitioner/manufacturer was negatived in respect of certain of the claims for deduction from out of the taxable turn over. It is only the appellate Tribunal which finally allowed the claim of the assessee with reference to the final assessment of liability by an order dated 03.06.1999, granting relief of deduction of the turn over, representing the trade discount, interest on credit sales received and advertisement expenses incurred by the main dealers. As a result of which, the petitioner/manufacturer is entitled for refund of the excess duty paid. Therefore, the assessee filed an application seeking refund of the excess duty paid by it.

58. The authority, before whom the application was filed, rejected the said claim. The appellate authority set aside the said order and remanded, while doing so, certain findings are recorded in favour of the petitioner/manufacturer. The said order was subject matter of further appeal at the instance of assessee before the CEGAT. The CEGAT allowed the appeal, setting aside the orders of the lower authorities, and recorded categorical findings that if the amounts are paid after the clearance of the goods, the principle *unjust enrichment* would not be applicable. The Tribunal categorically observed that since the payments in question were made subsequent to the period in question i.e. 01.03.1975 to 28.02.1983 then with reference to such payments

made much after clearance of the goods on sale basis, the principle of *unjust enrichment* cannot be raised, therefore, the matter was remanded to the original authority with specific direction to re-determine the refund claims made based on the facts of payments. It was further held that if the payments are pursuant to the orders of the Courts, CEGAT or as voluntary *ad hoc* payments on account of the request made or in the nature of deposits or made after the date of clearance, then the clause of *unjust enrichment* cannot be invoked.

59. In spite of such specific finding recorded, the 1st respondent, though determined the excess amount of duty paid by the assessee, but, however, rejected relying on some other decision of the Tribunal. Therefore, the petitioner was constrained to approach this Court by way of the present writ petition.

60. The Deputy Commissioner, after considering the payments that are made, recorded a finding that the petitioner/manufacturer has paid an amount of Rs.7,15,28,042/- in excess of the duty payable by it, apart from an amount of Rs.25 lakhs towards interest paid on 25.03.1999, which was ordered to be refunded. In so far as the excess duty is concerned, the 1st respondent took the stand that he was directed by the CEGAT while considering afresh the submissions made by the assessee as regards the payments of duties under protest, if any, and the effect of Rule-9(b)(5) to be retrospective or not which are left open to the petitioner to make its submissions while considering the refund. The 1st respondent referred to the payments date-wise and also the basis for the payment. It was found that an amount of Rs.12,76,14,220/- was paid by the assessee/manufacturer on different dates from 1986 to 1998 either by virtue of the orders of the Court or voluntary *ad hoc* payments or deposits made on account of the request of the department. Out of the above amounts, it is clear from the order

that an amount of Rs.6,40,00,000/- was paid as voluntary *ad hoc* payments during 31.08.1986 to 11.03.1987. In addition, a sum of Rs.2 crores was deposited on account of the request of the department on 15.01.1987, while the balance amount was deposited as per the orders of the Court. From this, it is clear that out of all payments, at least to the extent of the above referred amount of Rs.12 crores and odd was not paid in pursuance of the orders of assessment either provisional or final, but was paid, either at the request of the department by way of deposits or deposited as per the orders of the Court. The said amounts deposited are much more than the amount to which the petitioner/manufacturer is entitled for refund.

61. As already found even the department had issued circulars that where voluntary, *ad hoc* or pre-deposits are made and where the manufacturer succeeds in the proceedings, he is entitled not only for refund of the said deposit, but, also the said deposit is to be repaid with interest, as is held by the Apex Court in ***Mahavir Aluminium Ltd. Vs.CCE, Jaipur*** **(1 supra)** or by the Bombay High Court in ***Suvidhe Limited vs. UOI*** **(2 supra)** which was upheld by rejecting the special leave petition filed by the department before the Apex Court. In fact, the Apex Court ordered refund of the deposit with interest in ***CCE, Hyderabad vs. ITC Ltd.*** **(3 supra)** based on even draft circular which was placed before the Apex Court as early as in the year 2004.

62. Though on behalf of the department it was contended that in all cases of refund the principle *unjust enrichment* has to be applied and unless and until it is proved that no amount of duty was passed on to any third party, the manufacturer is not entitled for refund. But, in the facts of the present case, as is evident that the sale of the goods manufactured by the petitioner has taken place during the period of 1975 to 1983, while the payment of the duty was long after the clearance of the goods by way of sale. Therefore, there is absolutely no possibility for the

petitioner/manufacturer to pass on the liability of duty to any of the purchasers, and in fact, the department approved the price list and it is not their case that the petitioner/manufacturer has collected any amount over and above the approved price list so as to cover the duty that was paid by the assessee at a later stage i.e. long after the transaction of sale. In the absence of such finding, further, as the amounts have been paid by way of voluntary deposits at the request of the department long after the sales, it would be difficult to accept the contention of the respondent department.

63. In fact, number of decisions of the Tribunal were placed before this Court, though not by way of precedent, but to show where the department has accepted the orders of the Tribunal, where refund was ordered to the assessee-manufacturers, in case of pre-deposits or deposits made subsequent to the clearance of the goods, taking the view that the principle of *unjust enrichment* would not be applicable where the duty was paid long after the clearance of the goods by way of sale, in which case there will not be any occasion for the manufacturer to pass on the duty liability to the purchaser. Those orders were accepted by the department and orders have become final.

64. Under the above circumstances, We are unable to accept the view that was taken by the 1st respondent, especially in the light of the findings recorded by the Tribunal. In fact, the remand that was made by the appellate Tribunal to the 1st respondent

was not an open remand to consider the issue of principle of *unjust enrichment* in case of deposits made, as is specified in its order. The table as specified by the Deputy Commissioner giving the particulars of the deposits made by the assessee clearly shows that all those payments would fall under one or other category specified by the

appellate Tribunal, in which case the principle of *unjust enrichment* would not be applied. Therefore, the 1st respondent was not justified in denying the refund to the petitioners.

65. In that view of the matter, the impugned order of the 1st respondent, declining to grant refund, is set aside to that extent and ordered refund of the excess amount of duty found to have been deposited by the petitioner/assessee i.e to the extent of Rs.7,15,28,042/- with interest at 9% p.a. from the date of appellate order i.e. from 03.06.1999 till the date of payment.

66. The second writ petition i.e.W.P.20941 of 2004 is filed by the Department, questioning the order of the CEGAT allowing the appeal of the assessee and remanding to the original authority for the purpose of determining the excess amount as well as for ordering of refund subject to certain stipulations. The said order was passed by the appellate Tribunal on 22.11.2002. The said order was given effect to by the Deputy Commissioner, Excise, by passing the consequential order on 25.11.2003, where after determining the excess amount of duty paid by the assessee, however, declined to grant refund, applying the principle of *unjust enrichment*. The said consequential order was assailed by the petitioner

in the earlier writ petition. The said writ petition came to be listed for hearing and in fact, it was heard and it is only during the hearing of that writ petition, it was realised by the department that they have to assail the order of the CEGAT that is how the department filed the present writ petition on 11.11.2004.

67. The learned Additional Solicitor General contended that since the judgment of the Tribunal is contrary to the judgments of the Apex Court, therefore, the said order cannot be given effect to. The learned

Additional Solicitor General also contended that the Department did not realise the impact of the order of remand and therefore, it would not be able to file either an appeal or seek reference against the order of the CEGAT and when it has realised the implication of the order of the CEGAT, it has come up with the present writ petition, and therefore, in order to do justice, the writ petition ought to be entertained and allowed. The Additional Solicitor General relied upon the following judgments in support of his contentions.

68. In ***Roshan Deen v. Preetilal***[24] where the Commissioner for Workmen's Compensation had set aside his own earlier order, recording an agreement between the appellant and respondent employer after complaint-petition by the appellant, in the light of Section 17 of the Workmen's Compensation Act, 1923, which prohibits against the contract resulting in relinquishment of rights of the workmen. The said order was set aside by the High Court, exercising the jurisdiction under Article 227.

The Supreme Court, while allowing the appeal, held that the powers under Articles 226 and 227 of the Constitution of India, conferred on the High Court, are to be exercised to advance justice and not to thwart it, even where justice is the by-product of an erroneous interpretation of law, High Court ought not to wipe out such justice in the name of correcting the error of law.

69. In ***Ram and Shyam Company v. State of Haryana***[25] the Apex Court while setting aside the acceptance of an unsuccessful bidder's subsequent offer, being higher than the highest bid made in the auction, without affording opportunity to the highest bidder, held as arbitrary and against fair play. It was observed that while distributing State largesse by public auction, equal opportunity should be given to

all concerned and endeavour to fetch the best available price in public interest.

70. In ***Collector, Land Acquisition v. Katiji***[26] the Apex Court, while considering the scope of Section 5 of the Limitation Act, held that the State seeking condonation of delay, must be accorded same treatment as a private party.

71. On the other hand, the learned counsel for the respondent/assessee sought to contend that the writ petition is not maintainable. It is contended that against the order of the CEGAT, as per the law existing, as on that date, the department is entitled to seek a reference and the department failed to seek such a reference, and having failed to file any reference and having implemented the order of remand,

it is not open to assail the said order which was already given effect to by the department, accepting the order of the Tribunal. The learned counsel contended that specific time limits are prescribed for seeking a reference and there is not even provision for condonation of delay, if there is any delay in seeking reference and when the department is not in a position to seek any reference at the stage when the present writ petition is filed, therefore, filing a writ petition is an alternative or to overcome the legal bar, and such lapses could not be allowed by entertaining the writ petition. In any case, the learned counsel contended that the department having accepted and given effect to the order of the Tribunal, it is not open to it to assail the said order at a later stage.

72. Heard on either side and considered the material on record.

73. Admittedly, the order assailed in the present writ petition which was filed in November, 2004 was passed as early as on 22.11.2002 and the said order was given effect to by the Deputy

Commissioner by passing an order dated 25.11.2003, and it is only after an order of giving effect to the order of the Tribunal, the present writ petition is filed. As this Court has already gone into the merits of the order, giving effect to the order of the Tribunal, and as the issue was decided on merits in the light of the judgments of various Courts, including that of the Apex Court, We do not find any merit in the present writ petition filed by the department at a belated stage, that too, by-passing the other statutory remedies which were available to the department.

74. Under the above circumstances, W.P.26106/2003 is allowed as indicated above, and W.P.20941/2004 is dismissed. No order as to costs.

BILAL NAZKI,J

S.ANANDA REDDY,J

Dated: 24.09.2007
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